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No. 23

In the Supreme Court of the United States

OCTOBER TERM, 1930

CHARLES H. STANGE, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

REVISED

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OPINION BELOW

The opinion of the Court of Claims (R. 26–35) is reported in 68 C. Cls. 395.

JURISDICTION

The judgment of the Court of Claims was entered November 4, 1929. (R. 35.) Petition for writ of certiorari was filed January 3, 1930, and the writ was granted March 3, 1930. The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a written consent, executed by the taxpayer and the Commissioner of Internal Reve-

nue, under the provisions of Section 250 (d) of the Revenue Act of 1921, extending indefinitely the period of limitations upon the assessment of income taxes for the year 1914, is valid when given after the expiration of the period of limitations provided in that section.

2. Whether the written consent, which, by its terms, agrees only to a later "assessment" of the taxes, also applies to the collection thereof.

STATUTES INVOLVED

The Revenue Act of 1921, c. 136, 42 Stat. 227, 265, so far as material, provides:

> SEC. 250. * * * (d) The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding

> for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act: * * *.

STATEMENT

On February 19, 1915, the petitioner filed his Federal income-tax return for the calendar year 1914, reporting a taxable income of $824.08 and a tax thereon of $8.24, which was paid. (R. 17.)

On or about November 14, 1922, the petitioner executed and filed with the Bureau of Internal Revenue a written instrument, which, on or about March 16, 1923, was approved and signed by the Commissioner of Internal Revenue. The instrument is in the following form (R. 25):

> C. H. Stange, of Merrill, Wisconsin, in consideration of the assurance given him by officials of the Income Tax Unit of the Bureau of Internal Revenue that his liability for all Federal taxes imposed by the Act of Congress approved October 3, 1913, and also by the act of Congress approved September 8, 1916, as amended by the act of Congress approved October 3, 1917, on his net income received from all sources in the year ended December 31, 1914, and in the year ended December 31, 1917, respectively, shall not be

determined except after deliberate, intensive, and thorough consideration, hereby waives any and all statutory limitations as to the time within which assessments based upon such liability may be entered. It is understood, however, that the above-named individual does not, by the execution of this waiver, admit in advance the correctness of any assessment which may be made against him for the said years by the officials of the Income Tax Unit.

[STAMP:] (S) C. H. STANGE.

Approved March 16, 1923.

D. H. BLAIR,

Commissioner of Internal Revenue.

MERRILL, WISCONSIN, *November 10, 1922.*

The Commissioner of Internal Revenue determined that the petitioner's taxable income for the year 1914 was $642,138.40 in addition to that reported, and in February, 1924, assessed thereon an additional tax of $28,992.55, which was paid on March 19, 1925, together with interest in the sum of $1,787.21, or a total of $30,779.76. (R. 25–26.)

On June 8, 1927, the petitioner filed a claim for the refund of this $30,779.76 on the ground that the collection thereof was barred by the statute of limitations at the time of payment. (R. 26.) No action was taken on this claim (R. 26), and petitioner brought suit against the United States in the Court of Claims, which entered a judgment dismissing his petition (R. 35–36).

SUMMARY OF ARGUMENT

I. The general rule that a beneficiary under a statute of limitations may waive the benefit after the bar of the statute has intervened is applicable to this case. A statute of limitations, as a general rule, operates on the remedy, but does not extinguish the liability. The plea of the statute of limitations is a personal privilege which may be waived. In imposing the limitations of Section 250 (d) of the Revenue Act of 1921 upon the Government's right to determine, assess, and collect taxes, Congress clearly intended to sanction the application of common-law principles of waiver. Although there is a conflict of opinion in the Federal courts upon the precise point, we submit that the better reasoning supports our contention that a waiver executed after the expiration of the statutory period is valid and operative under the statute.

II. The fact that the consent did not expressly refer to the collection of the tax is immaterial. It was executed under authority of Section 250 (d) of the Revenue Act of 1921, which authorized consents for determination, assessment, *and* collection. This section must be considered in connection with the written consent. The intent of the parties to the instrument is clear. It would be unreasonable to assume that they entered into an agreement with the thought that it would authorize the assessment of a tax, but would not allow its collection.

ARGUMENT

The order of this Court granting the issuance of a writ of certiorari to review the determination of the Court of Claims in this case contained the following limitation upon the scope of the issues to be presented:

> * * * counsel shall confine themselves, in the briefs and in oral argument, to the questions involving the validity and effect of the waiver of the statute of limitations executed in this cause.

I

THE WAIVER SIGNED BY THE TAXPAYER AND THE COMMISSIONER ON NOVEMBER 10, 1922, AFTER THE EXPIRATION OF THE PERIOD OF LIMITATION IMPOSED BY SECTION 250 (d) OF THE REVENUE ACT OF 1921, WAS EXPRESSLY AUTHORIZED BY THAT SECTION AND EFFECTIVELY WAIVED THE LIMITATION

Prior to the enactment of the Revenue Act of 1921, there was no statute of limitations in effect barring the collection, by suit, of taxes for the year 1914. *Bowers* v. *New York & Albany Co.*, 273 U. S. 346, 350. The limitations provided in the Revenue Act of 1918 were not in terms retroactive and therefore applied only to taxes assessed under that Act (c. 18, Sec. 250 (d), 40 Stat. 1057, 1083).

In providing a five-year period of limitation upon the collection of taxes, the Revenue Act of 1921, in Section 250 (d), pp. 2–3, *supra,* specified that that period of limitation should apply to all prior Revenue Acts including the Act of August

5, 1909. In the same sentence of the section imposing this limitation, the following qualification of the limitation is prescribed:

> unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax.

Although this qualification is expressly attached only to the provisions relative to assessment, it obviously applies also to collection.

This was the first time that Congress by statute referred to the waiving of any statute of limitations applicable to the collection of taxes. The statute which in terms applies to returns filed more than five years before its enactment barred the assessment of taxes under such returns unless the requisite consent should thereafter be given. That in this respect the law was prospective in effect can not reasonably be doubted, because there was no such prior limitation, and therefore no occasion for such consent before its enactment. The suggestion in petitioner's brief (p. 23) that the right to collect taxes for 1914 might have continued beyond the time of the enactment of the Revenue Act of 1921 because of the past giving of waivers of the time for bringing suit is fanciful. Since until that enactment there was no limitation on the time for bringing suits for collection, there was no occasion for any such waivers. The further suggested possibility that waivers might have been given in cases of failure to file returns seems so remote that it can hardly be assumed that Congress inserted the provision in question merely to take care of such a

situation. Consequently consents given after its enactment avoid the bar in cases more than five years old when the Act was passed, and it follows that the very language of the statute contemplates an effective consent given after the period of limitation has expired. Any other interpretation deprives the qualifying words of any practical sense or meaning in their application to tax returns filed more than five years before the Act of 1921 was passed, and this in the face of its declared intention that the limitation, with its qualification dependent upon consent, shall apply in such cases. The case at bar is such a case.

In support of the contention that Section 250 (d) of the Revenue Act of 1921, *supra,* authorized the taxpayer and the Commissioner of Internal Revenue to consent, after the enactment of that provision, to the determination, assessment, and collection of any tax due under the Revenue Act of 1921 or any prior Revenue Act, the grammatical construction of the section is important. The word "consent" unquestionably denotes present or future action and not past action; and in the absence of words requiring "consent" before the period of limitation expires, it should be thus interpreted.

The position of the Government in this case is not unfair. It is the general rule that a beneficiary under a statute of limitations may waive the benefit after the bar of the statute has intervened. A statute of limitations operates on the remedy but ordinarily it does not extinguish the

right, and a claim which is barred, while it ceases to be a legal obligation, remains a moral one. The debt is not necessarily obliterated although the remedy to enforce collection is barred. *Campbell* v. *Holt,* 115 U. S. 620; *Sanger* v. *Nightingale,* 122 U. S. 176. A tax obligation is a debt. *Keen* v. *Sheehan,* 154 Mass. 208. See also *Price* v. *United States,* 269 U. S. 492. The statute of limitations is a statute of repose designed not merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demands after the true state of things may have been forgotten. *Gillingham* v. *Brown,* 178 Mass. 417.

The plea of the statute of limitations has been held to be a personal privilege of which a party may avail himself or not as he chooses. *Sanger* v. *Nightingale, supra.* In the case of *Bank* v. *Kimble,* 76 Ind. 195, the Supreme Court of the State of Indiana said (p. 203):

> The mere fact that a claim is old is no reason why it should not be paid. The law allows a man to be honest and to pay an honest debt, however stale and ancient it may be. He may interpose the statute of limitations, but he may waive it also.

If one individual who is indebted to another may waive the bar of the statute of limitations after it has intervened, certainly the same rule may fairly be applied to a citizen indebted to his sovereign. It would be a strange anomaly of law if in minor affairs of business the bar of the statute could be

waived for the benefit of individual creditors but could not be waived by a citizen for the benefit of the Government. In the absence of statutory authority a taxpayer may waive the statute of limitations and pay the tax. Yet it is urged in the case at bar that the specific authority granted by Congress to taxpayers to waive limitation curtailed or restricted existing rights instead of defining or regulating those already possessed. We submit that in imposing the limitations of Section 250 (d) of the Revenue Act of 1921 upon the Government's right to determine, assess, and collect taxes, Congress clearly intended to sanction the application of common-law principles of waiver. This was the obvious purpose of the qualifying clause, which must be read in qualification of any expression in the section which might be thought mandatory and therefore to exclude the possibility of waiver.

As the Court of Claims said in the instant case (R. 34–35):

> In the absence of a statutory provision either before or after the running of the statute of limitations, the taxpayer could by a mere oral statement waive the running of the statute. Even after the running of the statute, the moral obligation to pay any taxes that were properly levied would be a sufficient consideration for the waiver. * * * To hold that the statute requires the commissioner to consent to the waiver before the expiration of the period of limitation is to engraft upon the statute some-

> thing which certainly is not contained within its provisions nor, as we think, is there any reason to infer that such was the intent of Congress.

In *Perkins* v. *Dyer,* 71 Md. 421, the Court of Appeals of Maryland, in considering an issue identical in principle with that here presented, said (p. 423):

> Now prior to the Act of 1852, chap. 75, and the Act of 1874, chap. 483, there was not, as we all know, any statute of limitations applicable to the collection of taxes, and the object of these Acts was to prescribe a time within which county and city taxes should be collected, and, unless collected within that time to allow the party from whom they are demanded, the *privilege* of *pleading the provisions of* the *Act in bar* of *their recovery.* These Acts are nothing more or less, than statutes of limitation applicable to the collection of county and city taxes, and founded on the same reasons and policy as all other statutes of limitations are founded, and must be construed in accordance with the settled rules which govern the construction of such statutes. This being so, a promise on the part of the tax-payer to pay such taxes, made after the expiration of the time prescribed, must be held to take them out of the operation of the statute.

That such consents do not require a supporting consideration is clear. In *Loewer Realty Co.* v. *Anderson* (C. C. A. 2d), 31 F. (2d) 268, the court said (p. 270):

> It is objected that the waiver was without consideration, *but the statute requires nothing but a consent,* without mentioning consideration, * * *. (Italics ours.)

See also *Florsheim Bros. Co.* v. *United States,* 280 U. S. 453, 466.

On the precise question under consideration there has been a conflict of opinion in the Federal courts.

The petitioner relies upon the case of *Joy Floral Co.* v. *Commissioner* (Ct. App. D. C.), 29 F. (2d) 865. Undoubtedly there are expressions in the opinion of the court which support his contention, but the facts in that case are clearly distinguishable from the present case. That case involved Section 278 (c) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 300; and the court construed the words in that statute "*have consented* in writing to the assessment" to relate only to an agreement made prior to the expiration of the five-year period. The court's opinion stated (p. 867) that the taxpayer was led into the belief that the limitation had not expired by the erroneous statement in a letter from the Deputy Commissioner that the statute had not then but would presently expire. The court held, therefore, that the taxpayer did not intend to waive the rights which had accrued to it, and that the execution of the consent had been procured by the erroneous statement by the Deputy Commissioner. This appears to be the more substantial basis for the court's decision in that case. In the instant

case the element of misrepresentation is not present.

The *Joy Floral case* was followed in *Pictorial Printing Company* v. *Commissioner* (C. C. A. 7th), 38 F. (2d) 563. In the latter case, the court emphasized the fact that the revenue agent had threatened immediate assessment and collection, although the right to collect had already expired. The court held that the threat partook of the nature of duress, and undoubtedly attached weight to it in reaching its conclusion. The threat was tantamount to deceit and misrepresentation, and the court held the waiver invalid. With little discussion it also apparently applied the reasoning of the court in the *Joy Floral case* to the provisions of Section 250 (d) of the Act of 1921.

In *Chicago Railway Equipment Company* v. *Commissioner,* 39 F. (2d) 378, the Circuit Court of Appeals for the Seventh Circuit without discussion held that a waiver executed after the statute had run was invalid. As it was executed on December 10, 1925, the provision of the 1924 Act, rather than that of the 1921 Act, must have been involved; but there is no indication that the court would construe the two provisions differently. The case involved no element of misrepresentation or duress. This case is now pending before this Court on a writ of certiorari, No. 231, October Term, 1930.

In *W. P. Brown & Sons Lumber Company* v. *Commissioner,* 38 F. (2d) 425, the Circuit Court of Appeals for the Sixth Circuit, in a well-considered

opinion, held that a waiver executed after the statute had run was valid under the 1921 Act. This case is now pending before this Court on a writ of certiorari, No. 115, October Term, 1930.

In *Aiken* v. *Commissioner,* 35 F. (2d) 620, the Circuit Court of Appeals for the Eighth Circuit held that a waiver executed after the statute had run was valid under the 1921 Act. This case is pending in this Court on a writ of certiorari, No. 69, October Term, 1930.

In all of the above cases, the Board of Tax Appeals held the waivers valid. 7 B. T. A. 800; 12 B. T. A. 1407; 13 B. T. A. 471; 13 B. T. A. 1425; 10 B. T. A. 553.

In *Sabin* v. *United States,* decided on October 20, 1930, the Court of Claims followed its decision in the instant case and held a waiver of assessment of 1915 taxes valid, although executed after the expiration of the five-year period for assessment.

There are pending before this Court on petitions for certiorari two other cases which may raise questions as to the effect of waivers. *Mascot Oil Company, Inc.,* v. *United States,* No. 400; and *Roy & Titcomb, Inc.,* v. *United States,* No. 412.

II

THE WAIVER INVOLVED HEREIN, ALTHOUGH IN TERMS PROVIDING ONLY FOR THE ASSESSMENT OF THE TAX, IS APPLICABLE ALSO TO THE COLLECTION THEREOF

The consent filed by the taxpayer and accepted by the Commissioner of Internal Revenue in this

case "waives any and all statutory limitations as to the time within which assessments based upon such liability [1914 tax] may be entered." (R. 16.)

Section 250 (d) of the Revenue Act of 1921, pp. 2–3, *supra,* under which the said consent was given, provides a five-year period of limitation upon the collection of the tax—

> * * * unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax.

While the statute under which the waiver was given provides for a consent to a later "determination, assessment, and collection" of the tax, the written waiver executed by the taxpayer consented, in terms, only to a later "assessment" of the tax. Therefore, it is urged by the petitioner that the period of limitation for the "collection" of the tax was not waived and that even if the Commissioner of Internal Revenue had the power, under the waiver, to assess the additional tax determined to be due he did not have the power to collect it. It is argued, in substance, that the statute vested the Commissioner with the power to agree to perform three separate and distinct acts: (1) to determine the amount of the tax, (2) to assess the tax, and (3) to collect the tax; and that the authority of the Commissioner under a waiver is limited to the specific terms of the instrument.

We submit that the fallacy of this contention is patent. The statute authorizes the Commissioner

of Internal Revenue to perform a single act, namely, to consent to the "determination, assessment, and collection" of a tax after the bar of the statute of limitations has intervened. It was not necessary to repeat in the waiver all of the words in the statute, as the purpose and intent of the "consent" between the parties was clear. Had the waiver merely provided for a later "collection" of the tax, could it be contended with any force that it was invalid because the tax could be collected only after assessment and as the waiver did not provide for such assessment, collection could not be enforced?

See *Chambers* v. *Cline,* 60 W. Va. 588, and cases cited therein.

As the court below said in the instant case (R. 32–33):

> The ordinary meaning of the word "assess," when used in connection with matters of taxation, is to fix the amount to be paid by the taxpayer. An assessment can only be made if the taxpayer is liable for the tax, and if liable for the payment of the tax it follows that it was collectible. In other words, a prerequisite of the right to assess is the right to collect the tax when assessed. It would seem, therefore, that an agreement for an assessment was based upon the understanding that the tax was collectible if assessed.
>
> * * * * *
>
> It should be said also that the words "assess" and "assessment," when used with

> reference to taxes, often include the collection thereof as a necessary sequence. In fact the term "assess" is used at times to include all the steps involved in imposing a tax on property (*Allen* v. *McKay*, 120 Cal. 332), and "to assess" often means to levy a tax (see cases cited under note 76, 5 C. J. 813), the two words being used with practically the same meaning, Idem, 76 (b), and the words "to levy" always include the collection of a tax. The same rule applies to the word "assessment," and the parties evidently intended that the word "assessment" should also cover the collection of the tax.

In *Sabin* v. *United States,* decided on October 20, 1930, the Court of Claims followed its decision in the instant case and held that a waiver of "assessment" also applied to collection.

The word "assessment" as used in the waiver was a generic term and comprised all steps anticipatory of and including the collection of the tax. It must be presumed that the parties intended to perform a reasonable and logical act and that the waiver should accomplish a practical purpose. It would be unreasonable to assume that at the time when the waiver was filed by the taxpayer and accepted by the Commissioner of Internal Revenue it was the intention of the parties that the tax should be determined and assessed after the bar of the statute had become absolute, but that the taxes so found to be due should not be collected. The statutory period was the same for the collection of

the tax as for its assessment. It had expired when the waiver in question was executed.

It would also be unreasonable to assume that the parties were actuated by idle curiosity to ascertain the amount of taxes due or that they desired to have this data for statistical purposes. The only reasonable construction that can be accorded the waiver is that it consented to the determination, assessment, and collection of the tax after the statute of limitations had run, and the only intelligent and logical motive that can be ascribed to the parties thereto is that they both contemplated and intended that it should have this effect.

The waiver was accepted by the Commissioner of Internal Revenue, and apparently he performed all of the acts required of him thereunder. It is not denied that he deliberately, intensively, and thoroughly considered the petitioner's tax liability before determining or assessing the taxes against him.

In the case of *Loewer Realty Co.* v. *Anderson, supra,* the Circuit Court of Appeals for the Second Circuit, in considering a question involving the validity of a waiver, said (p. 270):

> * * * the taxpayer should not in any event be allowed to repudiate a consent upon which the Commissioner has relied.

In *Crowell Elevator Company* v. *A. B. Allison, Collector,* the United States District Court for the District of Nebraska, on August 18, 1930, held that a waiver providing only for the later assessment of

the tax was applicable also to the collection thereof. (This case has not as yet been officially reported, but the text of the court's opinion appears in Prentice-Hall Tax Service (1930) at pages 1857–1858, paragraph 1570.)

The United States District Court for the Western District of Pennsylvania, on June 28, 1930, held to the same effect in *Max Solomon* v. *Heiner, Collector.* (Opinion appears in Prentice-Hall Tax Service (1930), pp. 1617–1618, paragraph 1301.) This decision followed the decision by the same court on June 16, 1930, in the case of *Washington Coal and Coke Company* v. *Heiner,* 42 F. (2d) 681, wherein the question was fully considered.

The petitioner has cited certain authorities which held that a cause of action which has been barred by the expiration of the statutory period of limitations can not be revived by subsequent legislation, but those cases are plainly distinguishable from the one under consideration. As has been heretofore stated, there was no statute of limitations in force against the collection by suit of a tax for the year 1914 until Congress enacted the Revenue Act of 1921, *supra,* and in the same enactment it granted authority to waive the limitation therein provided. That Act did not purport to revive any cause of action which was barred, but provided certain conditions under which the bar first created therein should not apply. The petitioner and the Commissioner of Internal Revenue complied with the conditions therein expressed.

Petitioner's brief asserts that the Board of Tax Appeals "has consistently adopted the view" for which he contends. The case of *Chicago Insulated Wire & Manufacturing Co.,* 10 B. T. A. 1195, the only case cited for this point on petitioner's brief, did not turn on this point. The decision was predicated upon the ground that the waiver expired April 1, 1924, because of an order of the Commissioner of Internal Revenue.

The Board has decided the issue in accordance with the Government's contention in the following cases: *Watt & Holmes Hardware Co.* v. *Commissioner,* 8 B. T. A. 372; *Lutcher & Moore Cypress Lumber Co.* v. *Commissioner,* 19 B. T. A. 887.

CONCLUSION

The judgment of the Court of Claims should be affirmed.

Respectfully submitted.

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